

STATE OF MICHIGAN
COURT OF APPEALS

GARY E. GIUSTI,

Plaintiff-Appellant,

and

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

MT. CLEMENS GENERAL HOSPITAL,

Defendant-Appellee,

and

JAMES LARKIN, D.O., JAY KANER, D.O., and
TRI-COUNTY NEUROLOGICAL ASSOCIATES,
P.C.,

Defendants.

UNPUBLISHED
December 2, 2003

No. 241714
Macomb Circuit Court
LC No. 99-003849-NH

Before: Schuette, P.J., and Cavanagh and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's determination that the trial court properly disqualified Dr. Baker as an expert witness. Dr. Baker, who is board-certified in emergency medicine, never testified that he did not spend a majority of his time in ER clinical practice. Dr. Baker testified that in 1997 he spent twenty to twenty-four hours a week in ER clinical practice. He also testified that in 1997 he was doing eight to ten shifts of ER a month, while the full-timers were doing about fourteen shifts. Clearly, that is more than "half-time," and Dr. Baker's use of that term at his deposition was an approximation, as his testimony makes clear:

Q. During the 1997 period that's the issue—the focus on what the case is here, half of your time was spent in ER clinical. And what were you doing with the rest of your professional time?

A. Well, I spent –and, you know, I sort of say half-time, but it was actually more than 20 hours a week because we also worked 12-hour shifts. We worked

eights and twelves, so it was on the average of say, 20 to 24 hours a week. But, you know, I considered myself to be half-time clinical. I spend about one day a week doing this sort of stuff. I spend about another day a week doing medical education related things, mostly related to my own CME. And then at that time, I was spending a significant amount of time working on overseas programs, mostly in Russia and the former Soviet Union.

Thus, I disagree with the majority's assertion that Dr. Baker's testimony was "clear and unequivocal--he only devoted half of his professional time to the active clinical practice of emergency medicine . . . " Dr. Baker's enumeration of how he spent his days, cited by the majority as evidence that he did not devote more than half his time to ER clinical practice, was in response to questioning regarding what else he did with his time, i.e., what he did with his time beyond the more than half-time he devoted to ER clinical practice.

Further, Dr. Baker's affidavit does not contradict his deposition testimony. The affidavit states "I devoted a majority of my professional time to the active clinical practice of emergency medicine in the year immediately preceding the events in question," which is completely in keeping with Dr. Baker's deposition testimony.

I agree with the majority's rejection of plaintiff's remaining arguments. With respect to Dr. Mauskop, plaintiff failed to show that he actually provided adequate proximate cause testimony. Regarding Drs. Larkin and Kaner, plaintiff failed to show that they in fact would provide testimony on violation of the standard of care or that any violation was a proximate cause of injury.

/s/ Helene N. White